Chong Cheng & Others,[1] page 139, at pages 145 and 148 respectively:—

> "It has first to be observed that in this Colony it is not illegal to play games of chance for money. But it is illegal to keep a Common gaming house or to game in it, and common gaming house is either a place to which the general public are able to resort for the purpose of gaming, or a place which, though barred to the public, is kept or used by the owners or occupiers primarily for the purpose of gaming. I say 'primarily' because I think it is clear that a place does not become a common gaming house merely because gaming habitually occurs in it. A private residence is not a common gaming house because the owner makes a practice of inviting his friends to it to gamble. Nor in my opinion do the premises of an ordinary social club provides facilities for its members to gamble, and some of them habitually use the premises for that purpose".

> "It would be a most lamentable thing if the administration of our law were to give rise to the idea that indulgence in games of chance for money stakes, a common social amusement, notoriously practised by all classes of the community, becomes penal if practised by a Chinese night club. The real question in issue was whether the premises raided on this occasion were devoted exclusively to gambling or to general social purposes among which games of chance were included; and in my opinion the latter proposition is the natural inference to be drawn from the evidence".

This decision was approved by the Court of Appeal in the case of *Rex v. Lee Kim Poat & Another,*[2]. I would refer to the following passage in the judgment of Murison, C.J. (Page 134):—

> "This modified construction of the application of the Ordinance relating to gaming and betting thus has the authority of Stevens, J. in this Colony and of several Judges in England. It is further consistent with common sense; for without such modification we are left in this position that three quarters of the adult population of Singapore are unprosecuted criminals and in future no man could play old-maid with his own wife in his own house for a ten-cent stake without committing a criminal offence".

The correctness of these decisions has not been subsequently questioned in the Colony, and I consider that although I am not strictly bound by a decision of the Colony Court of Appeal, I should, in the absence of exceptional circumstances follow such decision.

Mr. Braddell argued that English decisions were of no assistance. I entirely agree with him, for English law on the subject is different, and to quote Lord Halsbury in *Knowles & Sons v. Lancashire & Yorkshire Railway Co.,* 14 A.C. page 248, at page 253:—

> "I do not think one gets any help from the construction of other Statutes passed at different times and in pursuance of different lines of thought".

The point, therefore, I have to decide is whether the facts in this case justify holding that this club was primarily or exclusively a gambling club. In my opinion they do not. In fact there is far more evidence in this case that the club was a *bona fide* social club than there was in *Fong Chong Cheng's*[1] case. The fact that some of the members of the club may have thought that in playing Tien Kau they were doing something unlawful, although it may put the onus on the defence to prove that the club was not a gaming house, does not prove that they were in fact doing anything unlawful; and the evidence as a whole in my opinion, applying the principles laid down by Stevens, J., did prove that this club was not a common gaming house.

In regard to the Magistrate's second ground of decision (page 29 of record) that a major part of the revenue of the club was derived from gambling, I would again refer to the judgment of Stevens, J. Habitual gaming was no doubt carried on in the Club, but it is common knowledge that it is habitually carried on in most clubs, and if a club chooses to derive a large part of its revenue from gaming, rather than as Mr. Braddell said from the sale of liquor, it does not necessarily become a common gaming house.

The appeals are accordingly allowed, and the convictions set aside. Acting in revision, I make a similar order in respect of these appellants who have no right of appeal. The fines paid will be refunded.

Order Accordingly.

[ORIGINAL CIVIL JURISDICTION]

GORDON-SMITH, J.

April 23, 1940.

IN THE MATTER OF THE ESTATE AND EFFECTS OF TIMAH BINTI ABDULLAH, DECEASED.

THE OFFICIAL ADMINISTRATOR, F.M.S.

(Plaintiff)

vs.

1. MAGARI MOHIHIKO
2. HAYASHI TOSE
3. UDAH BINTI BAKAR
4. STATE OF PAHANG

(Defendants).

Muhammadan Law—whether the rule that Non-Muhammadans are excluded from inheriting in accordance with Muhammadan Law applies in the

Federated Malay States—Distribution Enactment (Cap. 71) Section 2—Ascertainment of Mohammedan Law.

The deceased was a Japanese woman, who married a Malay and had become a convert to the Islamic faith. It was quite clear from the facts that the husband of the deceased, who had died before her, was at the time of his death, domiciled in the State of Pahang, and that similarly the deceased was also so domiciled. The deceased died on the 23rd April 1937 and the question was whether the next of kin of the deceased who were Non-Muhammadans could inherit the property of the deceased.

Held, that in the Federated Malay States under the Muhammadan Law, Non-Muhammadans are not entitled to succeed to the estate of a Muhammadan.

Cases referred to:—

(1) *Ramah binti Ta'at* v. *Laton binte Malim Sutan* 6. F.M.S.R. 128.

(2) *Ainan bin Mahamud* v. *Syed Abubakar bin Habib Yusoff* 1938 F.M.S.R. 91.

Mr. J. Calder for the Plaintiff.

Mr. F. A. Briggs for the 1st and 2nd Defendants.

Mr. M. C. Hay (Assistant Legal Adviser) for the 4th Defendant.

Gordon-Smith, J.—This Originating Summons, which was filed by the Plaintiff, asked for the Court's directions as to who was entitled to the property of the deceased. It was adjourned into Court for argument, Mr. Calder appearing for the Plaintiff, Mr. Briggs for the 1st and 2nd Defendants, Mr. Hay, Assistant Legal Adviser, for the 4th Defendant. The 3rd Defendant had not entered any appearance.

The facts, which are not in dispute, are as follows:—

The deceased Timah (hereinafter referred to as "the deceased") was a Japanese woman who, anyhow prior to 1913, had marriel a Malay Haji Hassan and had become a convert to the Islamic Faith. This Haji Hassan (hereinafter referred to as "the deceased husband") died on the 23rd March 1937, testate and under his will he appointed his wife, the deceased, to administer his estate, as regards which he gave directions as to its distribution and under which the deceased became a beneficiary.

The deceased died shortly after her husband, namely on the 28th April 1937 and the Official Administrator has been granted Letters of Administration with the will annexed of the estate of the deceased husband and Letters of Administration of the estate of the deceased, respectively.

There is no issue of the marriage.

The 1st and 2nd Defendants are respectively the mother and brother of the deceased.

The estate of the deceased consists of both movable and immovable property of a value of a few thousand dollars, but the value is immaterial.

It is quite clear from the facts that the deceased husband was, at the time of his death, domiciled in the State of Pahang and that similarly, the deceased was also so domiciled.

As the deceased's immovable property is situated in Pahang it is clear also that the law of Pahang is applicable to both the immovable and movable property.

The Muhammadan Law is part of the law in force in Pahang and one might say that in effect, it is the law of the land as regards Muhammadans. As such, it is not foreign law to be proved by expert evidence but is law of which the Court must take judicial notice and it is for the Court to declare what the law is.

(See *Ramah binti Ta'at v. Laton binti Malim Sutan,* 6 F.M.S.L.R. page 128).

In attempting to ascertain what that law is the Court may have recourse to appropriate books of reference. Section 57 (2) of the Evidence Enactment and *Ainan bin Mahamud v Syed Abu Bakar bin Habib Yusoff & others,* 1938 F.M.S.L.R. p. 91 at p. 93.

While admitting that it would be permissible for the Court to refer the questions of Muhammadan Law which arise out of this Originating Summons to the Pahang State Council, in accordance with the Determination of Muhammadan Law Enactment (Cap. 166), I do not think it would be desirable to do so in this case because, for one reason, the State of Pahang is itself a Defendant and an interested party and for another reason, this Court has had the advantage of hearing lucid argument by learned Counsel on the matter, which advantage would probably not be available to the State Council and finally, if such reference was made and a decision given accordingly, then such decision is final and cannot be the subject of an appeal. For these reasons I feel, therefore, that I should not take advantage of the loophole that is available under this Enactment and shirk my responsibilities although I confess that it is with some feeling of trepidation that I venture into

the intricacies and maze of Muhammadan Law and its alleged variations in its applicability, locally.

For the State it was submitted that the only possible other claimants to the deceased were the next of kin, i.e. the 1st and 2nd Defendants, and that they, being non-Muhammadans were therefore excluded from inheriting in accordance with Muhammadan Law.

The Distribution Enactment (Cap. 71) Section 2 provides

that "Nothing in this Enactment shall apply to the estate of any person professing the Muhammadan religion or shall affect the rules of Muhammadan law as varied by local custom in respect of the distribution of the estate of any such person".

This section is entirely opposed to the provisions contained in the Colony Ordinance Cap. 57 entitled The Mohammadans Ordinance which, although it provides for distribution of the estate of an intestate Muhammadan in accordance with Muhammadan Law, expressly provides that any next of kin who is not a Muhammadan shall be entitled to a share in the distribution as though he was a Muhammadan.

I mention this fact because in effect, I am asked by the Defendants to say that in this respect the Muhammadan Law here is the same as in the Colony, although in the Colony specific legislative provision was apparently necessary to enable a non-Muhammadan to inherit from a Muhammadan.

The Shafii school or interpretation of Muhammadan Law is applicable in Malaya and both according to Tyabji's Principles of Muhammadan Law (2nd Edition) page 834 paragraph 4 and Howard's Translation of the Minhaj et Talibin, paragraph 9 page 253, an infidel is excluded from and cannot succeed to the estate of a Muhammadan. There are other cases of exclusion from inheritance with which I am not concerned specifically.

There is no dispute that the deceased husband was a Muhammadan and professed the Muhammadan religion and there is no dispute that his wife, the deceased, became a convert to Islam. Neither is it disputed that the 1st and 2nd Defendants are non-Muhammadans.

It might also be noted that in India, as in the Colony, this exclusion from inheritance by a non-Muhammadan, was expressly abrogated by Act XXI of 1850 and in the note to paragraph 269 of Wilson's Anglo Muhammadan Law (6th Edition) in commenting on this Act the learned author states—

> "But for this enactment here would be no reciprocal rights of inheritance between a Muhammadan husband and a non-Muhammadan wife, even in the cases in which such unions are permitted by the law of Islam".

It is, however, argued that the Court should interpret Muhammadan law as it is in Malaya and not according to the strict theoretical Muhammadan law as it is to be found in text books.

I would observe, however, that section 2 of the Distribution Enactment itself refers to the rules of Muhammadan law "as varied by local custom" but such variation must necessarily be a matter of evidence and proof, of which there is none. There has been no evidence whatsoever before me nor has any reported case been quoted to me showing any local custom at all which would amount to variation of Muhammadan law either in this or in any other respect. In the absence of such evidence and proof and in the absence of specific local legislation to such effect, the only grounds on which this Court could, so I apprehend, hold that any specific part of the Muhammadan law was not or could not be in force here are that such would be contrary to the principles of natural justice. The Muhammadan law as to exclusion of inheritance by infidels has been in force for centuries in various parts of the world and I can see nothing in this particular exclusion which is contrary to natural justice. The fact that both in the Colony and in India legislation was necessary to abrogate the Muhammadan law in this respect only strengthens me in my view that it is not for this Court to attempt such abrogation and there are certainly no grounds on which I could hold that otherwise the Muhammadan law in this respect is not of full force and effect.

The answer to the question raised is, therefore, that the State of Pahang is entitled to succeed to the estate and there will be an order accordingly.

What the State does with the property is another matter and for the State itself to decide, but Muhammadan law appears to comtemplate that it should be utilized for the benefit of Muhammadans. Costs of this application, all parties, to come out of the estate.

Order accordingly.